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Nos. 71-268 and 71-5315

In the Supreme Court of the United States

OCTOBER TERM, 1971

ARTHUR HARRY ECKERT, PETITIONER

v.

UNITED STATES OF AMERICA

JOE FELIX ZAMORA, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI

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After a jury-waived trial with one Miles in the United States District Court for the Western District of Texas, petitioners were convicted of unlawful possession of amphetamines and barbiturates (21 U.S.C. (Supp. V) 331(q)(3)(A) and (B)). Petitioner Eckert (who was convicted on only one count) was sentenced to one year's imprisonment and a $1,000 fine; petitioner Zamora (who was convicted on two counts) was sen-

444-749—71

tenced to concurrent prison terms of five years and a $1,000 fine. The court of appeals affirmed (Pet. App.).

Petitioners contend that the trial judge committed reversible error when he refused to let Eckert call as a witness co-defendant Miles to corroborate Eckert's version of the events. The trial judge pointed out that he was the trier of facts and that he was aware of Miles' character and poor mental condition;[1] therefore he would not believe Miles "under a stack of Bibles."[2] The court of appeals, although recognizing that it would have been better practice to have permitted Miles to testify, properly concluded that the error was harmless beyond a reasonable doubt in the circumstances of this case.[3]

Petitioner Zamora also contends that the officers did not have probable cause to believe that his car contained illegal drugs when they searched it following the arrest of the three defendants therein. Briefly, the evidence, as summarized in the opinion below (Pet. App. 3–4, showed that on May 7, 1969, San Antonio police officer Butler received word from an informant who had previously furnished reliable information that Zamora had a large quantity of barbiturates in his possession and was scheduled that night to meet a Negro man at a specified location to transact a sale.

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[1] Miles had initially been found incompetent to stand trial.

[2] Miles was allegedly going to testify as to whether Eckert had handed Miles a brown sack; a police officer had so testified, and Eckert had denied the officer's testimony.

[3] As below, petitioner Zamora merely joins in this argument and adopts the brief of petitioner Eckert. This claim would not, however, logically affect the proof of Zamora's guilt.

Butler, who shortly before this had been advised by a federal narcotics agent that there was an outstanding parole violator's warrant for Zamora and that the federal bureau had also received information that Zamora was selling dangerous drugs in the San Antonio area, went to the specified location. He observed a parked automobile which he knew was Zamora's. From his own vehicle he shined a portable floodlight into the car and saw petitioner Zamora at the wheel, Miles in the front passenger seat, and petitioner Eckert in the rear. He also saw Eckert hand Miles a brown paper sack which Miles dropped out the window of the car. Butler radioed for assistance and then got out of his car to investigate. He picked up the sack which had been dropped on the ground and observed red capsules (which he believed to be seconal pills) wrapped in cellophane. At about that time other officers arrived and petitioners and Miles were arrested. The officers then searched Zamora's car and discovered a large amount of amphetamines and barbiturates underneath the back seat.

Petitioner Zamora apparently does not dispute that these facts considered alone established probable cause for the arrest and search as the court below held. He argues, however, that the reliability of the informant's tip was undermined by the fact that a previous search of Zamora's house pursuant to a search warrant, obtained on the basis of the same informant's information, had proved fruitless (see Pet. (No. 71–5315) 4, 8–9). This contention ignores the record. The record shows that the search warrant was obtained on May 6,

1969, and executed about 6:00 p.m. on May 7, 1969, only a few hours prior to the events described above. The search warrant included petitioner's car, if found at the motel premises which Zamora occupied. However, neither Zamora nor his car was at the premises when the warrant was executed; this prompted officer Butler to check with the informant and he was advised that Zamora was then on his way to transact a sale of the drugs. Obviously, in these circumstances, the fact that the search warrant when executed had not revealed any illicit drugs did not detract from the reliability of the informant's tip.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.